Nos. 15516-15519

United States Court of Appeals

For the Ninth Circuit

KEITH C. MORTON, Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, Appellee.

ROBERT E. KUNTZ, Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, Appellee.

EUGENE A. PICOTTE, Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, Appellee.

JOHN W. MAHAN, Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, Appellee.

Brief of Appellant

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THURBER'S HELENA

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INDEX

TABLE OF CASES

DECISIONS OF THE DEPARTMENT OF THE INTERIOR

UNITED STATES STATUTES

PRELIMINARY MATTERS

Pursuant to stipulation of counsel in the respective cases and to an order of this Court (R. 22, 38) this brief is submitted for consideration in four actions appealed to this Court, being causes Nos. 15,516-15, 519; Keith C. Morton, appellant, vs. Northern Pacific Railway Company, a corporation, appellee; Robert E. Kuntz, appellant vs. Northern Pacific Railway Company, a corporation, appellee; Gene A. Foote, appellant, vs. Northern Pacific Railway Company, a corporation, appellee, and John W. Mahan, appellant, vs. Northern Pacific Railway Company, a corporation, appellee.

All references will be to the first of these causes, the record of which was printed for consideration in connection with all four causes and the arguments herein presented shall be equally applicable to all four cases, they being identical except as to parties appellant and as to the land involved, each action involving a different quarter section of Section 35, Township 22 North, Range 48 East, M.P.M., McCone County, Montana, and each action having been brought by a different party, each of whom, however, are residents and citizens of the State of Montana, against the same party defendant.

1. Jurisdiction of the Lower Court and of This Court

Four actions were originally brought in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark and in each of said actions an alternative writ of mandamus was secured

(R. 18) requiring the respondent to convey to the relat
or applicant the quarter section of land described up
payment by the relator to the respondent company of t
sum of $2.50 per acre or to show cause why it had not do
so at a day and date certain.

Appellee Northern Pacific Railway Company remov
each of said actions to the District Court of the Unit
States, in and for the District of Montana, alleging that t
relator claimed to be entitled to the relief prayed for unc
proper interpretation of the terms and provisions of t
Act of Congress of the United States of 1864, 13 Stat. t
Large, p. 365, and under the terms and provisions of
joint resolution of Congress of the United States of M
31, 1870, 16 Stat. at Large, p. 378, and under the ter
and provisions of the land laws and homestead laws of t
United States of America, 43 U.S.C.A. Chap. 7, alleging th
in consequence the matter in controversy arises under t
laws of the United States, alleging further that relator i
citizen and resident of the State of Montana and that t
respondent is a corporation organized and existing unc
and by virtue of the laws of the State of Wisconsin a
that the action presents a controversy between citizens f
different states and alleging that the real property involv
exceeds the sum or value of $3,000.00, exclusive of intere
and costs. Under the provisions of Sections 1331, 1332 a
1441, Title 28 U.S.C.A., the Railway Company request
the District Court of the United States in and for the D
trict of Montana to accept jurisdiction over the controve
(R. 4-6). The petition for removal was not resisted by

pllant and appellant concedes that the cause is a proper one fr removal under the provisions of the United States Code ced by the respondent and appellee.

Appellee Northern Pacific Railway Company filed a mo-tn to quash the affidavit and application for writ of man-dmus, the order granting alternative writ of mandamus ad the alternative writ of mandamus (R. 20) which mo-tn was granted (R. 30-31) and judgment entered dis-nssing the cause (R. 31-32).

This Court's jurisdiction to hear and determine the ap-pal is based upon Section 1291, 28 U.S.C.A., providing tit the courts of appeal shall have jurisdiction of appeals fm all final decisions of the District Courts of the United Stes.

Notice of appeal was filed within time (R. 32). The re-qisite bond on appeal has been filed (R.33) and the ap-pal has since been prosecuted with diligence.

2. Statement of the Case

The action was commenced by the filing in the state court o an affidavit and application for writ of mandamus in wich affidavit and application it is stated that the Northern Pcific Railway Company is and was for sometime prior to th filing of the application the owner of the land involved in the action, that the land was granted to the predecessor o the respondent company, the Northern Pacific Railroad Cmpany, a corporation created by and pursuant to an Act o Congress of the United States of 1864, 13 Statutes at

Large, p. 365, by a joint resolution of the Congress of the United States of America of May 31, 1870, 16 U. S. Statutes at Large, page 378, which joint resolution provided in part as follows:

> "Provided, that all lands hereby granted to said company which shall not be sold or disposed of by it remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre * * *."

That the respondent acquired the lands subject to all of the duties, obligations and limitations contained in said joint resolution and that the said lands had never been sold or disposed of by the respondent or by its predecessor the Northern Pacific Railroad Company and are not now subject to the mortgage authorized by the said point resolution; that the road mentioned and referred to in the proviso of the joint resolution is the line of railroad originally commenced by the predecessor of the respondent and now owned and operated by the respondent; that the said line of railroad was fully completed many years ago.

The affidavit and application alleges the citizenship and majority of the applicant and relator, his right to the benefits afforded veterans of World War II under the land laws of the United States and the presentation on his behalf to the Northern Pacific Railway Company at its general office of an application to purchase the lands in controversy pur-

ant to the provisions of the Joint Resolution of May 31, 870, which application was accompanied by a tender of $.50 per acre. The affidavit and application then alleges ifusal on the part of the respondent to recognize and grant ch application to purchase. Relator seeks an alternative rit of mandamus commanding respondent to recognize d grant the application upon the payment of the sum of $.50 per acre or show cause why it has not done so and eks reasonable attorney's fees (R. 6-13). An alternative rit of mandamus was secured in the state court (R. 18).

By the motion to quash and dismiss (R. 20) respondent d appellee admits the truth of the factual allegations ntained in the affidavit and application for the writ. ate ex rel. Blenkner v. Stillwater County, 66 Pac. (2d) 8, 104 Mont. 387; State ex rel. Halloran v. McGrath, 67 c. (2d) 838, 104 Mont. 490, and it has been conceded roughout the proceedings below by the respondent and pellee that the lands involved are located in the second demnity belt provided for in that portion of the Joint solution of 1870 which reads as follows:

> "and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, be-

yond the limits prescribed in said charter, as will mal up such defiiciency, on said main line or branch, e cept mineral and other lands as excepted in the chart of said company of eighteen hundred and sixty-fou to the amount of the lands that have been grante sold, reserved, occupied by homestead settlers, pr empted, or otherwise disposed of subsequent to t passage of the act of July two, eighteen hundred a sixty-four."

For the convenience of the Court we have included an appendix pertinent provisions of both the Act of 186 13 Statutes at Large, p. 365, the original granting act, a the Joint Resolution of May 31, 1870, 16 Statutes at Larg p. 378.

The issue involved is exclusively a question of law a is as follows:

Does the settlement and premption proviso of the Joi Resolution of Congress of May 31, 1870, apply to the lan here involved which are lands acquired by the responde in the second indemnity strip provided for by the said Joi Resolution?

The lower court held that this issue had already be decided and that the proviso does not apply to lands with the second indemnity belt (R. 30).

SPECIFICATIONS OF ERROR

1. The Court erred as a matter of law in its memorandu and order filed February 1, 1957, granting the motion quash filed by respondent.

2. The Court erred as a matter of law in making and entering its judgment made and entered on February 5, 1957, dismissing the above-entitled action.

3. The Court erred in deciding that the lands involved in this action were not subject to the settlement and preemption proviso of the Joint Resolution of Congress of May 31, 1870 (Resolution 67, 16 Stat. 378) reading as follows, to-wit:

> "Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acres; * * *"

all based upon said decision sustaining respondent's motion to quash and dismissing the above entitled action.

ARGUMENT

At the outset it is necessary that this case be differentiated from Cause No. 14,983 in this Court, Russell v. Northern Pacific Railway Company et al., rehearing denied January 21, 1957. That case involved the applicability of the proviso to lands which were located within the original place land grant of the Act of 1864 and was an action by the succecsor in interest of a purchaser of those lands from the Railway Company to have declared void the mineral reservation contained in the original deed from the Rail-

way Company to said purchaser. This cause involves lan which were not within the granting act of 1864 but whi are located in the second indemnity belt provided for b the Joint Resolution of 1870, and involves an attempt b a prospective purchaser to take advantage of the benefi attempted to be afforded to such parties by the proviso the Joint Resolution.

The Proviso Is Applicable to the Lands Acquired by the Appell in the Second Indemnity Belt Pursuant to the Provisions the Joint Resolution of 1870.

At the outset we acknowledge that diligent and exhau tive research has uncovered no case which deals direct with the problem here involved. The lower court in co struing the proviso of the joint resolution has held th the words "hereby granted" in the proviso refer exclusive to the place lands granted by the Joint Resolution of 18 and that the lands acquired by the railroad company with the second indemnity limits also provided by the Joi Resolution of 1870 do not come within the operation the proviso. In so doing the lower court has relied, as d the appellee, upon decisions construing the words "here granted" as they appear in the Act of 1864 with particul reference to Sections 3 and 6 of that Act. The appellee the court below attempted to apply the authorities defini the words "hereby granted" appearing in Sections 3 and of the Act of 1864 to the words "hereby granted" as us in the proviso of the Joint Resolution of 1870. It is o contention that this phrase cannot thus be divorced fr the context of the proviso of the Resolution of 1870 a

construed by applying to it the meaning required by the purpose of the Act of 1864, particularly Sections 3 and 6, and the reasoning of the authorities defining the meaning of "hereby granted" as used in the Act of 1864. The issue involved is, of course, a problem in statutory construction, that is, what lands were referred to by the words "hereby granted" in the proviso of the Joint Resolution of 1870. In 50 Am. Jur. Statutes, Sec. 303, pp. 283-287 we find the following general rule relative to the construction of statutes:

> "The purpose for which a statute is enacted is of primary importance in the interpretation thereof. Indeed, a statute is often regarded as speaking as plainly by means of the purpose which underlies it as in any other manner. In any event, in the interpretation of a statute of doubtful meaning, it is proper to take into consideration its purpose or object, or the aim, design, motive, or end in view, or the aspirations intended to be efficiently embodied in the enactment. The construction of the statute should be made with reference to the purpose of the statute, or in the light thereof, and in harmony and conformity therewith, in order to aid, advance, promote, subserve, support, and effectuate such aim, design, motive, end, aspirations, or object."

In support of that statement the author cites among other cases, United States v. American Trucking Association, 310 U.S. 534, 60 Sup. Ct. 1059, 84 L. Ed. 1345, in which case the Supreme Court of the United States said:

> "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language

so as to give effect to the intent of Congress. There no invariable rule for the discovery of that intentio To take a few words from their context and with the thus isolated to attempt to determine their meanin certainly would not contribute greatly to the discove of the purpose of the draftsmen of a statute, partic larly in a law drawn to meet many needs of a maj occupation.

"There is, of course, no more persuasive evidence the purpose of a statute than the words by which t legislature undertook to give expression to its wish Often these words are sufficient in and of themselv to determine the purpose of the legislation. In su cases we have followed their plain meaning. Wh that meaning has led to absurd or futile results, ho ever, this Court has looked beyond the words to t purpose of the act. Frequently, however, even wh the plain meaning did not produce absurd results b merely an unreasonable one 'plainly at variance wi the policy of the legislation as a whole' this Cou has followed that purpose, rather than the liter words. When aid to construction of the meaning f words, as used in the statute, is available, there c tainly can be no 'rule of law' which forbids its u however clear the words may appear on 'superfic examination'. The interpretation of the meaning f the statutes, as applied to justiciable controversies, s exclusively a judicial function. This duty requires o body of public servants, the judges, to construe t meaning of what another body, the legislators, h said. Obviously there is danger that the courts' c clusion as to legislative purposes will be unconscious influenced by the judges' own views or by factors n considered by the enacting body. A lively appreciati of the danger is the best assurance of escape from

threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion. Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of generel acts. A few words of general connotation appearing in the test of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown'."

It is clear that we must examine the reasoning of the decisions relied upon by the lower court in its opinion in the light of the purpose to be achieved by Sections 3 and 6 of the Act of 1864 and if the purpose of the proviso is not the same and if the same reasoning cannot be applied in arriving at the meaning of the words as used in the proviso then it follows that the result arrived at by the lower court is not supported by the authorities upon which it relies.

It is appellant's contention that the proviso of the joint resolution applies equally to all of the lands acquired by the respondent pursuant to the joint resolution. That is, that the proviso applies not only to those lands granted in praesenti by the joint resolution but also to the lands in the indemnity strip set up by the joint resolution. We express no opinion as to whether or not the proviso may be applied to the lands granted in praesenti and the indemnity lands acquired by virtue of the Act of 1864 and included within the Act of 1864, that issue not being involved in this case. The appellant contends further that the proviso of the joint

resolution is mandatory and requires the appellee to com ply with the request of the appellant seeking to exerci his right granted to him by the clear and explicit provisio of the Joint Resolution of 1870.

With these contentions firmly in mind examination the authorities contained in the opinion of the lower cou reveals that they do not support the court's decision.

The first case referred to by the lower court is Priest N.P.R. Co., May 23, 1884, 2 Land Decisions 506 (R. 26 That case involved an issue as to the rights of a homeste entry on lands within the indemnity limits as distinct fro the place lands prior to slection by the railroad compan It was there held that the indemnity lands were open settlement and preemption and the decision is a refusal withdraw those lands from settlement and preemption.

The problem with which the Department of the Interi was concerned with respect to the indemnity lands pri to selection is more understandably presented in opinion of the Department of the Interior of May 17, 188 2 Land Decisions 511. It was the contention of the ra road company that under Section 6 of the granting act 1864 the indemnity lands as well as the place lands we withdrawn from settlement and preemption. The reaso ing of the Department of the Interior is best illustrated that portion of the opinion which reads as follows:

> "That this is true of the granted lands, 'in place,' now settled law as construed by the judicial tribuna the latest decision being that of Van Wyck v. Kneva

(106 U.S., 360). As to those lands there can be no question of the duty of this Department to give timely notice of the date and extent of this appropriation by prompt withdrawal, not alone for the protection of the company, *but for the protection of the settlers,* who can no longer acquire them.

"Respecting the indemnity belt, it is to be observed that the object of the law is to give within its entire limit just what has been lost in place, by other appropriation within the granted limits to the amount of lands intended to be granted, *and no more.* If by reason of such appropriation after the date of the act and prior to definite location the whole of the first belt shall be exhausted, *in that event* resort may be had to the second belt, under the act of 1870, to supply that particular loss, *and no more.*

Now, with respect to the definite location, the law makes absolute grant, with precision from that date as to particular lands, because those lands are immediately identified as a whole—being the alternate sections on each side of said road. The circumstances or status of each tract—whether 'vacant' or 'appropriated'—can then be ascertained. When ascertained it either falls within the grant as of its date or fails to pass on account of such exception as the law declares.

As to the indemnity law gives at date of definite location, not title but a right to acquire title by selection—based on the deficiency ascertained as above. And the provision of 1870 rests on a possibility that at date of definite location there may be in some State or Territory a want of sufficient lands in the limits fixed in 1864, on account of subsequent disposals, *to make the full original grant,* and allows the de-

ficiency thus caused to be supplied beyond the origin
limits.

"This might seem like a legislative reservation
the first limit or indemnity belt from the date
definite location. But the acts place the whole subje
'under the direction of the Secretary of the Interio
The power to direct a proceeding necessarily impli
not mere oversight in minor details, but control, supe
vision, discretion; and in such a matter as the selecti
and setting apart of public lands for any purpose, o
of a body of public lands, where the use of the wo
'select' implies that there is something left after sele
tion and where other right to acquire the lands alrea
exists, it must, I think, be held that the power resid
in this Department to adjudge when, in what manne
and to what extent, the statute requires the exerci
of such control and direction as to give to the publ
as well as the particular grantee, all the rights a
privileges granted by law." (Emphasis supplied).

It should be noted that there is no support in this opini
for any argument to the effect that the indemnity lan
once they were selected and that selection approved we
not lands granted by the act. What else could they b
The key to understanding the problem lies in the use
the words "in praesenti" referring to the so-called pla
limits. This definitive language appears in the decisi
cited in the above quoted opinion. Van Wyck v. Kneva
106 U.S. 360, 16 Otto 360, 27 L. Ed. 201-202.

"The grant is one in praesenti, except as its oper
tion is affected by that condition; that is, it imports t
transfer, subject to the limitations mentioned, of
present interest in the lands designated. The difficul

in immediately giving full operation to it, arises from the fact that the sections designated as granted are incapable of identification until the route of the road is 'definitely fixed'. When that route is thus established, the grant takes effect upon the sections by relation as of the date of the Act of Congress.'"

The reference to the place lands as lands granted in aesenti implies a distinction between those lands and the nds in the indemnity belt but that distinction does not eclue and in fact it suggests that the lands within the demnity belt are nonetheless granted lands after their lection by the company to replace lands lost to the grant praesenti.

The lower court relies in its opinion upon the case of ewitt v. Schultz, 21 Sup. Ct. 309, 180 U.S. 139, 45 L. l. 463 (R. 27). That case was ejectment brought by Hett, the homestead patentee, against Schultz, a purchaser om the N.P.R. Co. The land involved was within the st indemnity strip in the territory of North Dakota. Hett settled on the lands on April 10, 1882, and the comny had filed its selection list embracing the land inlved on March 19, 1883. The Department of the Interior ld that the lands in the indemnity limits did not fall thin the place lands and were not included in the term ereby granted" as used in Section 6 of the Act of July 2, 164, and were thus not subject to withdrawal from the eration of the Public Land Laws until a selection had en made by the company. The Supreme Court of the nited States upheld this construction. However, this in-

terpretation of the words "hereby granted" *even as used i Section 6 of the Act of 1864* was certainly not free fro doubt. The Supreme Court in its opinion said:

> "But without considering the matter as if it we for the first time presented, it is sufficient to say th the question before us cannot be said to be free fro doubt. The intention of Congress has not been s clearly expressed as to exclude construction or arg ment in support of the view taken by Secretaries L mar, Vilas, and Smith, and upon which the Land D partment has acted since 1888. 'It is the settled do trine of this Court', as was said in United States Alabama G.S.R. Co. 142 U.S. 615, 621, 35 L. Ed. 113 1136, 12 Sup. Ct. Rep. 308, 'that, in case of ambiguit the judicial department will lean in favor of a co sitruction given to a statute by the department charge with the execution of such statute, and, if such co struction be acted upon for a number of years, w look with disfavor upon any sudden change, where parties who have contracted with the government upo the faith of such construction may be prejudice These observations apply to the case now before u and lead to the conclusion that if the practice in t Land Department could with reason be held to ha been wrong, it cannot be said to have been so plain or palpably wrong as to justify the court, after t lapse of so many years, in adjudging that it had mi construed the act of July 2d, 1864. The order of wit drawal by the Secretary of the Interior, upon whi the title of the railroad company depends, being o of the way, there is no legal ground to question t title of the plaintiff to the land in dispute."

Certainly this case cannot be accepted as authority f the proposition that the words "hereby granted" as e

loyed in the settlement and preemption proviso of the oint Resolution of 1870 are subject to the same limitations s are those words as employed in Sections 3 and 6 of the ct of 1864.

In all of the cases which we have considered this proviso f the joint resolution was in no way involved. The deci- ion as to the meaning of the words "hereby granted" was oncerned only with those words as they appear in those ections of the act withdrawing lands from settlement and remption and there is no support therein for any argu- ent that the lands acquired in the indemnity belts were ot lands granted by the act when title was acquired by e railroad. True, the indemnity lands were not lands ranted in praesenti. The lands granted in praesenti were ose lands within the place limits. The distinction is one rising out of the basic intent behind the granting acts. The tent and attempt was to grant to the railroad a definite nd certain amount of land. To this end the railroad was ranted every odd numbered section within the socalled lace limits, which was the measure of the grant. It is self- vident that as to this grant the lands intended to be given ould be definitely ascertained immediately upon the filing f a map of definite location of the railroad. Hence the mpany's title could attach to those lands at once and erefore those lands were lands granted in praesenti. How- ver, it was contemplated and understood that there would e odd numbered sections of land within those place limits which the rights of others had already attached or which ight otherwise have been disposed of prior to the grant.

For that reason and in order to assure to the railroad com pany the amount of land intended to be granted to the com pany put no more, the indemnity limits were provided an from these limits the railroad company was to select land to replace those lost in the so-called place limits by reaso of prior disposal.

These lands within the indemnity belt were, howeve incapable of identification until such time as a deficienc became apparent in the place lands and the company mad a selection to replace that deficiency. For this reason th right to indemnity land was spoken of as a "float." See th language of the Department of the Interior employed i Atlantic Pac. Railroad Co, Sant Fe Pac. Railroad Co., an Greene Cattle Co., Inc., decided Jan. 8, 1944, 58 Land D cisions 577.

> *"The right of the grantee in indemnity lands pri to selection has also been described as 'only a* YOA *which attaches to no specific lands until the selectio is actually made* (Ryan v. Railroad Company, 99 U. 382, 386; Cedar Rapids, etc., Railroad v. Herring, 11 U.S., 39), *or as a right to no land capable of ident fication by any principles of law or rules of measur ment.* Kansas Pacific Railroad Company v. Atchiso Topeka & Santa Fe Railroad Company, 112 U.S. 41 421." (Emphasis supplied).

From the foregoing the problem confronting the Depar ment of the Interior and the courts in construing the wit drawal provided for in Section 6 of the Act of 1864 ca easily be understood. Withdrawal of the lands in the pla limits would not withdraw from settlement and preemptio

ıy lands which must be eventually acquired by the rail-
ad company if it met its obligations. However, with-
awal of the lands within the indemnity limits would im-
ediately result in the withdrawal of great areas of lands
hich would never be required by the company to com-
ete its grant. Hence the conclusion that "hereby granted"
employed in these sections of the Act of 1864 applied
ly to the lands granted in praesenti but it does not follow
at the lands within the indemnity limits are not granted
nds within the operation of the proviso of the Joint Reso-
tion of 1870 when they are acquired by the Railroad
)mpany.

With respect to the construction of this act as employed
the preemption proviso the problem is entirely different.
is to be noted that the preemption proviso does not go into
ect until five years after the completion of the entire
ad. The precise sections of the place lands granted by
e Act of 1864 and by the resolution are determinable im-
ediately upon the filing of the map of the route of the
ilroad and upon completion of twenty-five consecutive
les of road the company became entitled to patents con-
guous to such twenty-five miles of road. At this time
e sections of place lands lost to the grant would become
parent and the railroad would immediately be entitled
select from the indemnity lands replacement sections.
nce it is clear that five years after the completion of the
tire road the grant would be determined and the com-
ny's title to both the place and indemnity lands fixed.
nsequently, it is obvious that the problem with respect

to the construction of Sections 3 and 6 of the Act of 186 does not apply in connection with the construction of th proviso in the joint resolution requiring the lands grante to the company to be opened to settlement and preemptio at the expiration of five years after the completion of th entire road.

It should be clear that these indemnity lands when a quired by the railroad are lands granted by the act or th resolution depending upon the indemnity limits with which they are contained. The railroad company was t receive a specified amount of land measured by the prima provision of the grant relative to the place lands. Th only purpose apparent for the indemnity provision was t replace lands which were for some reason not available i the place limits. When those lands were acquired the obviously become as much a part of the grant as were th lands within the place limits. In the case of United Stat v. N.P. Railway Co., 256 U.S. 51, 41 Sup. Ct. 439, 65 Ed. 825, 828, we find the following language of the Su preme Court of the United States demonstrating this pro osition:

> "The provision relating to indemnity lands *was much a part of the grant* and contract as the one r lating to land in place (Payne v. Central P.R. Co. 2 U.S. 288, ante, 598, 41 Sup. Ct. Rep. 314), and it apparent from the granting act and resolution th 'it was the purpose of Congress in making the gran to confer a substantial right to land within the i demnity limits in lieu of lands lost within the pla limits'. Weyerhaeuser v. Hoyt, 219 U.S. 380, 387,

L. Ed. 258, 261, 31 Sup. Ct. Rep. 300." (Emphasis supplied)

This proposition is also supported by the case of Southern Pacific Railroad Co. v. Bell, 22 Sup. Ct. 232, 183 U. S. 679, 46 L. Ed. 386, and by the very quotation from that case which is set forth in the opinion of the court below (R. 28).

> "If the command of the statute were to withdraw from the market, instead of survey, all odd-numbered sections within the 40-miles strip, the position of the railroad company in this case would be impregnable; but as the withdrawal only extends to the lands 'hereby granted, we must look elsewhere to ascertain the meaning of those precise words. There is good reason for withdrawing lands within the place limits, since these lands already belong to the railroad company, as soon as they are identified by the location of the line, while lands within the indemnity limits may never be required at all, and in most cases are required only to a limited extent. *Undoubtedly the company acquires title to both classes of lands by the 3d section of the granting act;* but it acquires a title to lands within the place limits by a present grant; but to land within the indemnity limits, only by a future power of selection. *In both cases the statute is the origin of the title;* but in the one case it gives instantaneously; in the other it is a mere promise to give in the future, and requires the action of the railroad to perfect it. The words 'hereby granted' evidently refer to the former." (Emphasis supplied).

Of course, the only act of the railroad necessary to perfect the grant as to indemnity lands is a selection thereof.

Again, the distinctive definition "in praesenti" applie to the place land is the key. By referring to the land a land granted in praesenti the obvious intention is to di tinguish it from the land within the indemnity limits, how ever, it cannot be disputed that the railroad company a quired those lands within the indemnity limits by grant an neither can it be disputed that the grant as to the secon indemnity belt must be found within the Resolution of 187 This is self evident because without the Resolution of 187 the company could never have become entitled to any lan within the area embraced by the second indemnity belt.

We have given no consideration to the case of N.P. McRae, 6 Land Decisions 400, quoted from by the cou below (R. 26) for the reason that that decision has nothin whatever to do with the problem involved. As stated b Secretary Lamar, in the opinion from which the cou quotes, the sole issue there involved was as follows:

> "The sole issue presented in this case is whether th Northern Pacific Railroad Company has a grant lands for the line of its road from Portland to Pug Sound."

That case had nothing whatever to do with the provis of the joint resolution with which this case is concerne

During the interval between the Act of July 2, 186 and the Joint Resolution of 1870, the prodigality of th immense grants to the railroads and the interest of th public therein became a matter of the utmost concern. S

Great Northern R. Co. v. U.S., 315 U.S. 262, 62 S. Ct. 529, 86 L. Ed. 836. The development of the policy in favor of the public evidenced by such proviso as the one here under consideration coupled with the circumstances that the Northern Pacific had failed to perform the conditions of the Act of 1864 renders it well nigh inconceivable that Congress would adopt a proviso requiring disposition to settlers of merely that fraction of the lands to be acquired under the Joint Resolution of 1870 which were the place lands adjacent to the newly authorized line over the Cascades. Such an idea would result in a situation which we feel would be indefensable. Indemnity lands were available for settlement and preemption until selection by the company. After selection by the company and approval of that selection title to the indemnity lands vested in the company and the company became the owner thereof precisely as was true as to the place lands. What then is the result under the lower court's ruling? The result simply stated would be that the place lands granted by the Resolution of 1870, title to which passed to the railroad company immediately, would be open to settlement and preemption five years after the completion of the road whereas the indemnity lands selected by the company to replace lands which were not available in the place limit would not be open to settlement and preemption after their selection by the railroad company. This result is absurd on its face. The railroad company would acquire a better right under the secondary portion of the grant than it acquired under the primary portion thereof. It seems obvious to us that

the intent of the congress was that all lands acquired b virtue of the joint resolution should be open to settlemer and preemption five years after the completion of the er tire railroad.

The language of the Joint Resolution of 1870 confirm the conclusion that the proviso is applicable to all of th land acquired under the terms of the resolution. First, th joint resolution authorized the mortgaging of all Norther Pacific's property of all kinds and descriptions, thereby en powering the mortgaging of its entire unearned land gra including indemnity and place lands granted by the Res lution of 1870 and making it plain that the resolution applicable to all lands encompassed by the resolution. Nex the resolution reaffirms the authorization to construct th road "under the provisions and with the privileges, gran and duties provided for in its act in incorporation," fro the original point specified in the original act and unsp cified in the joint resolution by a changed main line rou to Portland with authority for a branch line to Pug Sound through the Cascade mountains. Thus again in i re-affirmation of authority to construct the road the refe ence is to the entire line. Next, in the event "in any sta or territory" the amount of land granted is not availabl an additional "lieu land" belt is provided. The referenc to "state or territory" makes it plain again that the Joi Resolution of 1870 is embracing the line from beginnin to end. Lastly within the single section comes the two-fol proviso, the first referring to disposition and the secon referring to foreclosure sales and each of these is base

pon the words "lands hereby granted." The proviso gov-ns all that has gone before. The words "lands hereby :anted" cannot be applied to a small fraction thereof as final disposition to settlers without being equally ap-icable to but a small fraction as to foreclosure sales. Yet, has never been contended that the proviso as to fore-osure sales is applicable only to this small fraction of the :ant, no doubt for the reason that the mortgage authorized the Joint Resolution of 1870 is clearly applicable to the ıtire grant. Just as the proviso as to foreclosure applies the lands granted along the entire line so also its counter-ırt as to final disposition of granted lands applies at the :ry least to all lands acquired under the joint resolution.

The applicability of the proviso to the lands here in-)lved is confirmed by later congressional expression. Thus e joint congressional committee acting under the Resolu-)n of June 4, 1924, (43 Statutes at Large, 461) among its her castigations of the railroad collusion, fraud and hunting of the legislative and public will states as one of i reasons for the forfeiture of the Northern Pacific's then ıtsanding indemnity claims:

> "(d) The failure of the Northern Pacific Railroad Company to dispose of any of the granted lands through settlement and preemption after July 4, 1884, as required by the Resolution of May 31, 1870, * * * " (Report of the committee is found in the Congressional Record of March 2, 1929, 70th Congress, 2nd Session, Vol. 70, part 5, pages 4118 to 5122).

Acting upon the committee report the Congress by its

act of June 25, 1929, expressed its continuing purpose an intention that the policy of the joint resolution of 187 relative to disposition of granted lands should prevai Section 3 of that Act (46 U.S. Statutes at Large, p. 41; 4 U.S.C.A., Sec. 921) provides in part as follows:

> ". . . and the passage of this Act shall not be cor strued as in anywise evidencing the purpose or inte tion of Congress to depart from the policy of th United States expressed in the resolution of May 3 1870, relative to the disposition of granted lands b said grantee, and the right is hereby reserved to th United States to, at any time, enact further legislatio relating thereto."

The Land Grant Case of 1940

The lower court in its opinion cites and relies upon U.S v. Northern Pacific Ry. Co., 61 Sup. Ct. 264, 311 U.S. 31 85 L. Ed. 210 (R. 30). The only portion of that opinio which could conceivably be considered as applicavle is tha portion thereof reading as follows:

> "We hold, contrary to the Government's assertio that the proviso of the Resolution of 1870, requirin the lands be opened by the company to settlement an preemption applies only to the additional lands grante by that Resolution and not to lands *acquired* under th grant of 1864. We hold further that the compan was not a trustee of the lands for the United Stat either in its own right or in behalf of possible settler It results that the Government cannot call upon th company to account as a trustee for the proceeds o sale of the lands." (Emphasis supplied).

As we have previously pointed out the lands here involved are not lands *"acquired under the grant of 1864"* consequently the statement from the land grant case of 940 has no applicability to the present case. Furthermore, hile we do not argue in this case that the proviso can be pplied to lands which were included within the Grant of 364 still by way of demonstration that the land grant se certainly cannot be considered as authority in this se we submit that there is good reason in that opinion r holding that the proviso does apply to lands included ithin the grant of 1864 but which were not earned at the ne of the joint resolution. The case was brought as a sult of the Act of June 25, 1929, previously cited, directg the forfeiture of certain land grants to the Northern acific and instructing the Attorney General to file an tion to quiet title, for accounting and damages against e Northern Pacific wherein the congress expressed its conuing intent as to disposition by the Northern Pacific in cordance with the policy of the Joint Resolution of 1870. the Act of May 22, 1936, (49 Statutes at Large, 1369, hapter 444) there was authorized a direct appeal to the preme Court of the United States of the action against orthern Pacific instituted by the Attorney General in acrdance with the Act of June 25, 1929. The proviso of te Joint Resolution of May 31, 1870, was a major issue.

The government contended in its appeal, No. 33, before te Supreme Court of the United States that the proviso as binding upon Northern Pacific as to every part of the nds granted to it, that the Northern Pacific had breached

the policy of the United States prescribed in the provis thereby wholly defeating its right to any further awar (311 U.S. 317, at page 338). The Northern Pacific move to dismiss this charge, was sustained by the Special Maste and the District Court ordered the dismissal. On appe the Supreme Court of the United States reserved its ruling saying:

> "The justices who heard this case are equally divide in opinion upon these issues. No opinion is expresse upon them, and they are reserved, in view of the fa that our rulings on other issues may be dispositive o the entire controversy." (311 U.S. 342).

and the judgment was reversed for further proceeding

> "The appeal in No. 4 is without merit, but, upo the appeal in No. 3, the judgment is reversed and th cause is remanded for further proceedings as indicate in this opinion." (311 U.S. 376).

In its paragraph 18 of the opinion the Supreme Cou of the United States passed upon the government's clai for damages by reason of the Northern Pacific's breach o the proviso. That court specifically held, contrary to th ruling of the District Court, that the government w entitled to prove any damage to it or advantage to th Northern Pacific arising out of the breach of the provis As to additional lands granted by the joint resolution b not as to lands *"acquired"* under the grant of 1864 (31 U.S. 268). Here we might remark that this holding is judicial determination that the appellee here is bound b the proviso as successor to the federally chartered corpor tion, the foreclosure sale and proceeedings notwithstandin

nited States v. Northern Pacific R. Co., supra, 311 U.S. 17, unquestionably determined that the proviso established legally enforceable obligation. It unequivocally decided at the obligation applied to all additional lands received the company under the Joint Resolution of 1870. The urt reserved the question as to whether the proviso ap- ied to every part of the granted lands on the issue of for- iture of right to further awards of lands. At the same me the court held that no damages would lie as to "lands quired" under the Act of 1864, but that damages would e as to the lands received pursuant to Joint Resolution of 870. These rulings would be inherently contradictory un- ss the word "acquired" is given its logical meaning, mely those lands actually earned by adjacent construc- on accepted by the government under the terms of the ct of 1846 but prior to and without using the benefit of e Resolution of 1870.

The court also reserved the question of whether the each of the conditions of the Act of 1864 by Northern cific defeated its entitlement thereunder (311 U.S. 1365, ragraph 1). The court in United States v. Northern Pa- ic R. Co. did not attempt to delineate the lands which ere "acquired" by Northern Pacific under the Act of 64. This was a factual matter, the decision on which as dependent upon the taking of testimony and the cause as remanded for that purpose.

The case was finally compromised and an adjudication contemplated by Congress was not had and Judge

Schwellenbach so stated. See U.S. v. Northern Pacific R Co., 41 Fed. Supp. 273 at 280. The district judge's mi: givings as to the decree based upon settlement witho congressional authority are obvious from his expression The consequence of this decree by compromise is the al sence of ruling on the facts and contentions which th Supreme Court of the United States reserved.

By the foregoing it has not been our intention to a tempt to secure in this court a review of this court's dec sion in Russell v. Northern Pacific Railway Co., et al Cause No. 14983. We have been concerned only with th proposition that the decision of the Supreme Court of th United States in the land grant case of 1940, U.S. v. Nortl ern Pacific Ry. Co., supra, 311 U.S. 317, is not authori for the lower courts holding that the proviso does not appl to the lands here involved.

THE PROVISO ENJOINS UPON THE APPELLEE A POSITIV DUTY TO PERFORM THE ACTS SOUGHT TO B COMMANDED

That the proviso of the Joint Resolution is a peremptor command of law to the Company is demonstrated by th following authorities.

In U.S. v. N. P. Ry. Co., 61 Sup. Ct. 264, 311 U.S. 31 84 L. Ed. 210, the land grant case of 1940, the court saic

> "A majority of the Justices who heard this case a of the opinion that the proviso of the Resolution 1870 *required* the company to open the lands grante by the Resolution to preemption and settlement at tl

expiration of five years from the completion of the entire line in 1887, whether the lands were then subject to the mortgage or not; that its failure so to do was a breach of its contract with the United States and that the Government is entitled, if it can, to prove any damage to it or advantage to the company, which resulted from this breach of contract." (Emphasis supplied).

The preemptory nature of the proviso may also be demstrated by comparison with the grant considered in the se of Oregon & California Ry. Co. v. U.S., 238 U.S. 393, Sup. Ct. 908, 59 L. Ed. 1360. The proviso in the granting t there involved read as follows:

"That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty Cents per acre;"

In that case the United States Supreme Court held that e above-quoted proviso was not a mandate to sell but a nitation of the power to sell. The court said:

"There could not be an absolute right to settle or purchase unless there was an absolute compulsion to sell." '

The Supreme Court was clearly correct as to the proviso volved in the case last above cited. The words "shall be ld to actual settlers only" are words of limitation, not of rection. The proviso in this case, on the other hand, reired that the lands be subject to settlement and preiption at a price to be paid to the company. How can

it be said that the lands are open to settlement and pr emption if the company could refuse to sell to a perso seeking to purchase under the proviso? Clearly the provi in the Resolution of 1870 was a mandate to sell provide of course, that there should be a purchaser. This requir ment is recognized by the Supreme Court of the Unite States in the quotation set forth above from United Stat v. N. P. Ry. Co., supra, 61 Sup. Ct. 264. That this w and is a continuing requirement is demonstrated by t quotation previously set forth at the beginning of this bri from Oregon & California Ry. Co. v. U.S., supra, 238 U. 393, which we repeat at this point.

> "We may observe that the Acts of Congress are la as well as grants, and have the constancy of laws well as their command and are operative and oblig tory until repealed."

See also the Act of Congress of 1929 providing for t bringing of the action, referred to by respondent as t Land Grant Case of 1940, wherein the Congress of t United States said:

> "* * * and the passage of this Chapter shall not construed as in anywise evidencing the purpose or i tention of Congress to depart from the policy of t United States expressed in the resolution of May 3 1870, relative to the disposition of granted lands said grantee, and the right is hereby reserved to t United States to, at any time, enact further legislati relating thereto." 43 U.S.C.A. 923.

This proviso of the Joint Resolution of 1870 was ma with the clear intent and purpose to prevent an enormo

ant to the Railway Company from resulting in a tre-
endous land monopoly, recognizing that such would not
to the best interest of the country. A country benefits
ly as its people are benefitted and clearly the prospective
rchasers from the company should have received and
ould receive the benefit of the proviso.

It is understandable that the Company should seek to
rpetuate the tremendous advantage received by virtue of
e land grants but the Congress, in making the additional
ant of the Resolution of 1870, sought to limit that ad-
ntage to a legitimate and reasonable benefit to the Com-
ny in aid of its construction.

CONCLUSION

Based upon the foregoing it is respectfully submitted that
e court below erred in sustaining appellee's motions to
ash and in rendering judgment dismissing the cause. It
further submitted that if the purpose of the Congress is
t to be flouted and ignored further this cause must be
ersed and remanded with directions to overrule the
tion to quash.

Respectfully submitted,

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ANLEY P. SORENSON
17 Power Block, Helena, Montana
Attorneys for Appellant.

CHAP. CCXVII—An Act Granting Lands to Aid in th Construction of a Railroad and Telegraph Line fro Lake Superior to Puget's Sound, on the Pacific Coas by the Northern Route.

"Be it enacted by the Senate and House of Represent tives of the United States of America in Congress a sembled * * *

"SEC. 3. And be it further enacted, That there be, an hereby is, granted to the 'Northern Pacific Railroad Co pany', its successors and assigns, for the purpose of aidi in the construction of said railroad and telegraph line the Pacific coast, and to secure the safe and speedy tran portation of the mails, troops, munitions of war, and publ stores, over the route of said line of railway, every alte nate section of public land, not mineral, designated by od numbers, to the amount of twenty alternate sections p mile, on each side of said railroad line, as said compa may adopt, through the territories of the United State and ten alternate sections of land per mile on each side said railroad whenever it passes through any state, an whenever on the line thereof, the United States have fu title, not reserved, sold, granted or otherwise appropriate and free from preemption, or other claims or rights, at t time the line of said road is definitely fixed, and a pl thereof filed in the office of the commissioner of the gener land-office; and whenever, prior to said time, any of sa sections or parts of sections shall have been granted, so reserved, occupied by homestead settlers, or preempted, otherwise disposed of, other lands shall be selected by sa

ompany in lieu thereof, under the direction of the Secre-
ry of the Interior, in alternate sections, and designated by
ld numbers, not more than ten miles beyond the limits
said alternate sections; * * *

"SEC. 4. And be it further enacted, That whenever said
Northern Pacific Railroad Company' shall have twenty-
ve consecutive miles of any portion of said railroad and
legraph line ready for the service contemplated, the Pres-
ent of the United States shall appoint three commissioners
examine the same, and if it shall appear that twenty-
ve consecutive miles of said road and telegraph line have
en completed in a good, substantial, and workmanlike
anner, as in all other respects required by this act, the
mmissioners shall so report to the President of the United
ates, and patents of lands, as aforesaid, shall be issued to
id company, confirming to said company the right and
le to said lands, situated opposite to, and coterminous
th, said completed section of said road; and, from time
time, whenever twenty-five additional consecutive miles
all have been constructed, completed, and in readiness
aforesaid, and verified by said commissioners to the
esident of the United States, then patents shall be issued
said company conveying the additional sections of land
aforesaid, and so on as fast as every twenty-five miles
said road is completed as aforesaid: Provided, That not
ore than ten sections of land per mile, as said road shall
completed, shall be conveyed to said company for all
at part of said railroad lying east of the western boundary
the State of Minnesota, until the whole of said railroad

shall be finished and in good running order, as a first-cla railroad, from the place of beginning on Lake Superior the western boundary of Minnesota: Provided, also, Th lands shall not be granted under the provisions of this a on account of any railroad, or part thereof, constructed the date of the passage of this act. * * *

"SEC. 6. And be it further enacted, That the Preside of the United States shall cause the lands to be survey for forty miles in width on both sides of the entire line said road, after the general route shall be fixed, and as fa as may be required by the construction of said railroa and the odd sections of land hereby granted shall not liable to sale, or entry, or preemption before or after th are surveyed, except by said company, as provided in th act; but the provisions of the act of September, eighte hunlred and forty-one, granting preemption rights, and t acts amendatory thereof, and of the act entitled 'An A to secure homesteads to actual settlers on the public d main,' approved May twenty, eighteen hundred and sixt two, shall be, and the same are hereby, extended to a other lands on the line of said road, when surveyed, e cepting those hereby granted to said company, and the r served alternate sections shall not be sold by the gover ment at a price less than two dollars and fifty cents p acre, when offered for sale.

"* * *

"SEC. 8. And be it further enacted, That each and eve grant, right, and privilege herein are so made and giv

, and accepted by, said Northern Pacific Railroad Com-
ny, upon and subject to the following conditions, namely:
hat the said company shall commence the work on said
ad within two years from the approval of this act by the
esident, and shall complete not less than fifty miles per
ar after the second year, and shall construct, equip, fur-
sh, and complete the whole road by the fourth day of
ly, anno Domini eighteen hundred and seventy-six.

"SEC. 9. And be it further enacted, That the United
ates make the several conditioned grants herein, and that
e said Northern Pacific Railroad Company accept the
me, upon the further condition that if the said company
ake any breach of the conditions hereof, and allow the
me to continue for upwards of one year, then, in such
se, at an time thereafter, the United States, by its con-
ess, may do any and all acts and things which may be
edful and necessary to insure a speedy completion of the
id road.

"SEC. 10. And be it further enacted, That all people of
e United States shall have the right to subscribe to the
ck of the Northern Pacific Railroad Company until the
ole capital named in this act of incorporation is taken
, by complying with the terms of subscription; and no
rtgage or construction bonds shall ever be issued by
d company on said road, or mortgage, or lien made in
y way, except by the consent of the congress of the
ited States.

"* * *

"SEC. 20. And be it further enacted, That the better
accomplish the object of this act, to promote the pub
interest and welfare by the construction of said railro
and telegraph line, and keeping the same in worki
order, and to secure to the government at all times (b
particularly in time of war) the use and benefits of t
same for postal, military, and other purposes, congress m
at any time, having due regard for the rights of s
Northern Pacific Railroad Company, add to, alter, amer
or repeal this Act."

"(No. 67). A Resolution authorizing the Northern I
cific Railroad Company to issue its Bonds for the Constr
tion of its Road and to secure the same by Mortgage, a
for other Purposes.

"Resolved by the Senate and House of Representatives f
the United States of America in Congress assembled, Th
the Northern Pacific Railroad Company be, and hereby
authorized to issue its bonds to aid in the construction a
equipment of its road, and to secure the same by mortga
on its property and rights of property of all kinds and
scriptions, real, personal, and mixed, including its franch
as a corporation; and, as proof and notice of its legal e
cution and effectual delivery, said mortgage shall be fi
and recorded in the office of the Secretary of the Interi
and also to locate and construct, under the provisions a
with the privileges, grants, and duties provided for in
act of incorporation, its main road to some point on Pu
Sound, via the valley of the Columbia river, with the ri

locate and construct its branch from some convenient oint on its main trunk line across the Cascade Mountains Puget Sound; and in the event of there not being in any ate or Territory in which said main line or branch may located, at the time of the final location thereof, the iount of lands per mile granted by Congress to said Comny, within the limits prescribed by its charter, then said mpany shall be entitled, under the directions of the Secary of the Interior, to receive so many sections of land longing to the United States, and designated by odd numrs, in such State or Territory, within ten miles on each le of said road, beyond the limits prescribed in said char-, as will make up such deficiency, on said main line or anch, except mineral and other lands as excepted in the arter of said company of eighteen hundred and sixty-four, the amount of the lands that have been granted, sold, erved, occupied by homestead settlers, preempted, or herwise disposed of subsequent to the passage of the act July two, eighteen hundred and sixty-four. And that enty-five miles of said main line between its western minus and the city of Portland, in the State of Oregon, all be completed by the first day of January, anno Domini ghteen hundred and seventy-two, and forty miles of the maining portion thereof each year thereafter, until the iole shall be completed between said points: Provided, it all lands hereby granted to said company which shall t be sold or disposed of or remain subject to the mortge by this act authorized, at the expiration of five years er the completion of the entire road, shall be subject to

settlement and preemption like other lands, at a price
be paid to said company not exceeding two dollars and fif
cents per acre; and if the mortgage or other legal procee
ing, or the mortgaged lands hereby granted, or any
them, be sold by the trustees to whom such mortgage m
be executed, either at its maturity or for any failure
default of said company under the terms thereof, such lan
shall be sold at public sale, at places within the States a
Territories in which they shall be situate, after not l
than sixty days' previous notice, in single sections or su
divisions thereof, to the highest and best bidder; Provid
further, That in the construction of said railroad, Americ
iron or steel only shall be used, the same to be man
factured from American ores exclusively.

"SEC. 2. And be it further resolved, That Congress m
at any time alter or amend this joint resolution, having d
regard to the rights of said company, and any other partie

'ATE OF MONTANA }
)UNTY OF LEWIS AND CLARK } ss.

_____being first duly
'orn upon oath deposes and says: that he is the Printer
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s his office and place of business and Billings, Montana,
iere said attorneys reside and have their place of business.

Subscribed and sworn to before me this_____

y of_____, 1957.

_____

Notary Public for the State of Montana,
Residing at Helena, Montana.

My commission expires_____

_____.